

February 24, 2012

John A. Nagel
Assistant City Attorney
555 Santa Clara Street
P O Box 3068
Vallejo, CA 94950

Re: Your Request for Advice
Our File No. A-12-013

Dear Mr. Nagel:

This letter responds to your request for advice on behalf of Councilmember Stephanie Gomes regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This letter is based solely on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Additionally, nothing in this letter may be construed to evaluate any conduct that has already taken place.

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws, such as Government Code Section 1090 and common law conflict of interest.

QUESTION

May Councilmember Gomes take part in decisions by the Vallejo City Council regarding the city's negotiations with any of the city's four bargaining units in light of the fact that the negotiations will involve the city's contribution towards employee medical premiums, which will ultimately affect the city's contribution towards medical premiums paid on behalf of the councilmember's husband, a retired city police captain?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

Yes. Pension benefits from the City of Vallejo, such as the city's contribution to a retiree's medical premiums, do not constitute "income" under Section 82030(b)(2). Therefore, the city is not a source of income to Councilmember Gomes. Moreover, a decision regarding the city's contribution towards the medical premiums for all employees and retirees within any of the city's four bargaining units is a decision that potentially affects only the salary, per diem, or reimbursement for expenses the councilmember receives from the city. Provided that Councilmember Gomes has no other economic interest affected by the decision, she may take part in a decision regarding the negotiations with any of the four bargaining units so long as the decision would not be setting a salary (including a retirement benefit) for the councilmember's husband that differs from salaries (including retirement benefits) paid to other employees or retirees in the husband's former job classification or position.

FACTS

You are the assistant city attorney writing on behalf of Stephanie Gomes, a member of the Vallejo City Council regarding her potential participation in upcoming labor negotiations with the Confidential, Administrative, Managerial, and Professionals Association of Vallejo (the "CAMP") and other city employee bargaining units.

The City of Vallejo is a charter city located in Solano County. The city employs approximately 466 persons. The majority of the city's employees are represented by labor organizations pursuant to the Meyers Miliias Brown Act. The city recognizes four exclusive representatives of city employees. Local 2376 of the International Brotherhood of Electrical Workers (the "IBEW") represents the city's non-safety rank and file members, Local 1186 of the International Association of Firefighters (the "IAFF") represents the city's fire protection personnel, the Vallejo Police Officer Association (the "VPOA") represents the city's sworn police personnel, and the CAMP represents the city's confidential and management personnel.

After her election to the city council, councilmember Gomes married Mr. Tony Pearsall, a former Vallejo Police Officer and retired Vallejo Police Captain. During a portion of his employment with the city, Mr. Pearsall was represented by the VPOA. He was represented by the CAMP at the time of his retirement on May 13, 2003. Mr. Pearsall also served on the Vallejo City Council from December 2, 2003, to December 4, 2007. He declined to reenroll in CalPERS during this time.

Currently, Mr. Pearsall receives a CalPERS pension based on his employment with the Vallejo Police Department. Pursuant to the Public Employee Medical and Hospital Care Act (the "PEMHCA"), he is also entitled to receive a payment by the City of Vallejo towards his retiree medical premiums. The PEMHCA provides that the city's direct contribution towards retiree medical premiums is the same as the contribution made on behalf of active employees. Because Mr. Pearsall retired as a member of the CAMP, he receives a payment by the City of

Vallejo towards his medical premiums, which are the same as any other individual in the CAMP retiree medical program.

During the City of Vallejo's proceedings for Chapter 9 Bankruptcy, the city negotiated a reduction in the city's contribution towards the medical premiums for members of the VPOA. As negotiated, the City of Vallejo's payment was reduced from 100% of any plan to 100% of the Kaiser Bay Area premium at each level of participation (i.e., single, employee plus one, and employee plus two or more). Subsequently, the City of Vallejo reached an agreement with the CAMP to reduce the city's contribution towards medical premiums for members of the CAMP to 80% of the Kaiser Bay Area premium at each level of participation. The City of Vallejo also imposed reductions in the city's contribution towards the medical premiums paid for members of the IAFF, members of the IBEW, members of the city council, and executive management employees from 100% of any plan to \$300 per month. Both the IAFF and the IBEW ultimately agreed to these reductions as part of their labor agreements. All of these reductions were imposed on retirees from each of the respective bargaining units by virtue of the PEMHCA.

Notwithstanding the previously negotiated reductions, the City of Vallejo adopted a five-year plan during bankruptcy proceedings establishing a goal of reducing the city's contribution towards the medical premiums of all employees and retirees to \$300 per month.

At this time, agreements between the City of Vallejo and both the VPOA and the IAFF are set to expire on June 30, 2012. The city's agreement with the IBEW will be expiring on December 31, 2012. The city anticipates that it will begin bargaining with both the VPOA and the IAFF in the near future. It is also likely that the city will be initiating bargaining with the IBEW while negotiating with the VPOA and the IAFF. The city does not intend to jointly negotiate any of these agreements.

The City of Vallejo's agreement with the CAMP is set to expire on June 30, 2013. The city does not anticipate bargaining to begin with the CAMP until after it has approved new agreements with the VPOA, the IAFF, and the IBEW.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in any given governmental decision.

Steps One and Two: Is the individual a public official making, participating in making, or influencing a governmental decision?

As a member of the city council, Councilmember Gomes is a “public official” within the meaning of the Act.² (See Section 82048.) In addition, the councilmember is making, participating in making, or influencing a governmental decision when taking part in any decision by the Vallejo City Council regarding the negotiations between the city and each of the city’s four bargaining units.³

Step Three: What are the official’s economic interests?

Section 87103 provides that a public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official’s economic interests, described as follows:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); Regulation 18703.1(b)).
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An economic interest in a source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)

² If a public official’s office is listed in Section 87200, which specifically includes city council members, and the official has a conflict of interest in a decision noticed at a public meeting, the official must: (1) verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting and immediately prior to the discussion of the item; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences, and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5 subdivisions (c) and (d) apply. (Section 87105.)

³ A public official “makes a governmental decision” when the official, acting within the authority of his or her position, votes on a matter, obligates or commits his or her agency to a course of action, or enters into a contractual agreement on behalf of his or her agency. (Section 87100; Regulation 18702.1.) A public official “participates in making a governmental decision” when, acting within the authority of his or her position and without significant substantive review, the official negotiates, advises or makes recommendations to the decision maker regarding the governmental decision. (Section 87100; Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision before his or her own agency if, for the purpose of influencing the decision, the official contacts or appears before a member, officer, employee, or consultant of his or her agency. (Section 87100; Regulation 18702.3.)

- An economic interest in a source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- An economic interest in his or her personal finances, including those of his or her immediate family. This is known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Under the Act, “income” is defined to include any community property interest in the income of a spouse. (Section 82030(a).) Thus, your question implicates Councilmember Gomes’s potential economic interest in the City of Vallejo as a source of income and her economic interest in her personal finances and those of her immediate family.⁴ However, in regard to the councilmember’s interest in the city as a source of income, salary and benefits paid (including retirement benefits) by the city to its employees are generally not considered “income” under Section 82030(b)(2) and Regulation 18232(a). Therefore, Councilmember Gomes does not have an economic interest in the city as a source of income based upon the retirement benefits provided to her husband.

However, material financial effects on an official’s governmental salary may still be disqualifying under limited circumstances as a material and foreseeable financial effect on the official’s personal finances and those of her immediate family. Thus, we continue the analysis limited to financial effect on Councilmember Gomes’s economic interest in her and her immediate family’s personal finances.

Step 4: Is the official’s economic interests directly or indirectly involved in the governmental decision?

“A public official or his or her immediate family is deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family.” (Regulation 18704.5.)

Under this regulation, the official’s economic interest in his or her personal finances is directly involved in the decision if the decision would have *any* financial effect at all, even a single-penny effect, on the official’s or his or her immediate family’s personal finances such as the retirement benefits received by Councilmember Gomes’s husband.

Step Five: Will there be a material financial effect on the official’s economic interests?

While Regulation 18705.5 sets the materiality standard for a financial effect on an official’s economic interest in his or her personal finances at \$250, Regulation 18705.5(b) provides an exception for certain governmental decisions regarding salary including retirement benefits.

⁴ “Immediate family” is defined as the official’s spouse and dependent children. (Section 82029.)

“The financial effects of a decision which affects only the salary, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives from a federal, state, or local government agency shall not be deemed material, unless the decision is to hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her immediate family, or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position.” (Regulation 18705.5(b).)

Based upon the facts you have provided, a decision by the Vallejo City Council regarding the city’s negotiations with any of the city’s four bargaining units is a decision that potentially “affects only the salary, per diem, or reimbursement for expenses the public official...receives from a federal, state or local government agency...” (Regulation 18705.5(a).) Barring any other economic interest Councilmember Gomes may have, the councilmember may take part in these decisions pursuant to Regulation 18705.5(b) so long as the decisions would not be setting a salary (including retirement benefit) for the councilmember’s husband that differs from salaries (including retirement benefits) paid to other employees or retirees in the husband’s former job classification or position.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl